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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
	)	CS Docket No. 97-98
Amendment of Rules and	)	
Policies Governing Pole	)	
Attachments	)	

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS"), pursuant to the Notice of Proposed Rulemaking, FCC 97-94 (released March 14, 1997) and the subsequent Order DA 97-894 (released April 29, 1997), hereby submits its initial comments in the above-captioned docket. The ALTS comments are limited in scope. ALTS' silence on the other issues raised in the NPRM should not be viewed as acquiescence in the Commission's proposals and ALTS may comment on those additional proposals in the reply phase of this rulemaking.

ALTS is the national trade association representing more than thirty facilities based competitive local exchange carriers. The members of ALTS will be affected by the Commission's decision in this proceeding as the formula for determining the maximum just and reasonable rates that utilities may charge for attachments to a pole, duct, conduit or right of way will apply to all telecommunications carriers pending the effectiveness of the new formula that is required by the Telecommunications Act of

1996.[1]

The members of ALTS have experience in attempting to obtain pole attachments from numerous entities, including incumbent local exchange carriers and other utilities. Many negotiations have been unsatisfactory both as to the process and the outcome. While not universal, competitive carriers have found substantial intransigence by many utilities and blatant refusals to negotiate in a reasonable manner or in compliance with existing rules. It is not uncommon for competitive carriers to find that their agreements are discriminatory vis a vis various other attaching entities. For these reasons, ALTS urges the Commission to carefully review the claims made by the utilities as to the amounts of useable space and costs incurred in providing attachments and to closely monitor compliance with the rules ultimately adopted.

I. Scope of the Rules

The rules that the Commission proposes to modify address the maximum rate that utilities may legally charge for pole attachments. As an initial matter, the Commission should either

[1] Pub. L. No. 104-104, 104 Stat. 56 (1996). Congress directed the Commission to issue a new pole attachment formula for telecommunications carriers within two years of the effective date of the Act but that formula will not become effective until five years after enactment. 47 U.S.C. § 224(e)(1).

expand the scope of its rules to cover all charges relating to pole attachments or, if that is not feasible, to articulate, and limit, what other charges may be levied with respect to pole attachments. As the Commission is aware, there are a number of very significant nonrecurring charges that utilities recoup up-front from entities seeking pole or other attachments that are not included in the monthly fee. The largest of these tend to be fees for assessing the availability of space, make-ready fees and modification fees[2] but some companies have attempted to extract additional excessive fees[3] or to place conditions on the pole attachment agreements that result in large increases in the costs to attaching carriers.[4] The Commission needs to ensure that

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[2] The Commission has found that

> "With respect to the allocation of modification costs, we conclude that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification."

First Report and Order in In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (released Aug. 8, 1996), 11 FCC Rcd 15499, 16096 (1996), Order on Reconsideration, 11 FCC Rcd 13042 (1996), petition for review pending sub nom. Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. 1996)(hereinafter Local Competition Order).

[3] For example, utilities have insisted upon attaching entities obtaining insurance well above the amount necessary to cover any reasonable risk to the utility.

[4] In one instance, for example, a utility required an attaching telecommunications carrier to modify all of its customer and carrier contracts to hold the utility harmless for any injury arising from any pole attachment.

these additional costs and/or conditions are not used to negate the Commission's rules, which are designed to ensure that pole attachment rates comply with the statutory requirement that such rates be "just and reasonable."

Second, the Commission needs to make clear that its new rules cover what are commonly known as "transmission facilities". In the Local Competition Order, the Commission made it clear that transmission facilities are generally included in the Section 224 (f)(1) mandatory access requirements.[5] Because there is no mention of "transmission facilities" in the Notice in this rulemaking, there could be a question raised as to the applicability of the rules to those facilities. The experience of ALTS members that have been able to obtain attachments to transmission poles has been that utilities attempt to extract rates well above what would be the rate under the Commission's formula for distribution poles. The Commission needs to explicitly state that its formula includes transmission facilities.

II. Proposed Rule Changes

Based upon a study submitted by a number of electric utilities, the Commission seeks comment on whether it should

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[5] 11 FCC Rcd at 16084.

increase the presumptive pole height and to decrease the presumptive usable space in its formula. ALTS does not currently have information on average pole heights. However, it is counterintuitive that an increase in the presumptive pole height would be accompanied by a decrease in the presumptive useable space. The Commission should carefully evaluate the utilities' claims in this regard.

The Commission also seeks comment on a Southwestern Bell Telephone Company Petition for Clarification, which was filed in August of 1994. SWB argues that the Commission's pole attachment formula can produce a negative net cost for a bare pole, and therefore can result in a negative rate. SWB asserts that this can arise as the original costs of the poles are depreciated over time, particularly since the cost of removing the pole at the end of its useful life is included in the original cost of the pole. Because of this anomaly, SWB seeks to extract the cost of removing poles from the formula for calculating accumulated depreciation.

Although it is not clear that the "problem" that SWB raises is widespread (or in fact that Southwestern would be under compensated if it did happen), assuming for the sake of argument that what SWB is alleging can happen will in fact happen on occasion, there is absolutely no need for the Commission to change its rules.

The formula that concerns SWB is the Commission's formula for determining the maximum rate allowed. However, the statute also includes a minimum rate allowed.[6] Section 224 of the Telecommunications Act "assures a utility of the recovery of not less than the additional costs of providing pole attachments". The "problem" that SWB has identified cannot occur because even if the maximum rate formula occasionally would result in a negative rate under the Commission's formula, the statute contemplates a minimum rate that covers additional costs incurred by the utility. As noted above, current rules provide that all make ready and modification expenses (including pole replacement and transfer costs) will have already been paid by the attaching carrier.[7] These tend to be the largest expenses incurred when an attachment is made. To the extent that there may be additional

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[6] The statute provides that:

> For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total useable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1).

[7] ALTS believes that this rule also should be reconsidered by the Commission. When a carrier seeking attachment pays for an upgrade that results in additional capacity for the underlying utility, there may be a windfall for the utility, which may be able to rent the additional capacity to other telecommunications providers.

upkeep and administrative expenses to the utility caused by the attachment, those "additional costs" are payable by the attaching entity under the first part of Section 224(d)(1).

With respect to the proposed formula for conduit attachment rates, the Commission proposes a rebuttable presumption that a cable attacher occupies a half-duct of space. (NPRM at para. 46). This presumption appears to be based upon out-of-date engineering. With the deployment of fiber and the engineering of smaller innerducts the space available in the average duct has increased to at least three or four in the past several years and appears to continue to increase with time. Thus, the Commission's presumption appears to understate the amount by which the average duct can be subdivided. The Commission should ensure that its presumption is based upon the latest engineering information available.

CONCLUSION

For the foregoing reasons, ALTS urges the Commission to ensure that all costs incurred by attaching telecommunications carriers meet the "just and reasonable" standard, and that the rebuttable presumptions adopted by the Commission reflect the

most recent engineering advances.

Respectfully submitted

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June 27, 1997

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of the Association for Local Telecommunications Services was served June 27, 1997 on the following persons by hand service.

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